83-1934

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ELAINE RIDDICK,

Petitioner,

v.

CLIFTON CRAIG, JACOB KOOMEN, M.D.,
R. L. ROLLINS and SUE CASEBOLT,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

KENNETH N. FLAXMAN
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
(312) 236-8558
Attorney for Petitioner

Pandick Midwest Inc., Chicago • 454-7600

QUESTIONS PRESENTED

1. Did *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982) eliminate the subjective element of the qualified immunity defense available to state officials in actions brought under 42 U.S.C. § 1983?

2. Are state officials, who ordered the sterilization of a 14 year old black girl who had become pregnant after being raped, entitled to immunity if they acted in "subjective good faith" in ordering the sterilization without notice or an opportunity to be heard and by applying a racially unfair standard to a palpably inadequate record?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 12, 1984.

OPINION BELOW

The opinion of the court of appeals affirming the judgment entered in the district court (App. A1-A3) and the prior opinion of the court of appeals reversing the district court's grant of summary judgment to respondents (App. A4-A7) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a). The judgment of the court of appeals was entered on January 12, 1984 (App. A8), a timely petition for rehearing was denied on February 24, 1984. (App. A9.)

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the due process clause of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the "North Carolina Eugenics Act," N.C.Gen.Stat. § 35-36 et seq. (1968) reproduced in the appendix *infra*, A10-A21.

STATEMENT

Petitioner is a 30 year old black woman who became pregnant at age 13 after being raped. Petitioner, the holder of a two year associate degree from a community college, was sterilized in 1968 pursuant to an *ex parte* order of the "Eugenics Board of North Carolina," entered upon a finding that petitioner was "feebleminded."[1]

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[1] The order of the Eugenics Board was entered under color of the Carolina Eugenics Act then in effect, N.C.Gen.Stat. § 35-36 et seq. (App. A10-A21.) The Act authorized the sterilization of

> any mentally diseased or feebleminded resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or the next of kin, or the legal guardian of such mentally defective person. (N.C.Gen.Stat. § 35-37.)

The expert who testified on behalf of respondents at trial conceded that the definition of "feebleminded" used by the Eugenics Board in this case would have included half of the black population of North Carolina.

Respondents, members of the Eugenics Board and its executive secretary, relied upon a "consent" form signed by petitioner's father—who respondents knew was partially mentally disabled and who respondents knew did not have legal custody of petitioner—to order petitioner's sterilization without notice and without furnishing petitioner with a right to be heard.[2]

At trial, petitioner contended, *inter alia*, that respondents had "ordered her sterilization without due process of law when they accepted a consent form signed by plaintiff's father and made their decision on the basis of factual assertions which had not been submitted in writing and under oath to the Eugenics Board."[3] (Pre-trial Order, ¶ 1(a).) The district judge, over petitioner's timely exception, charged the jury that subjective good faith was a complete defense (App. A3 n.2):

> If the defendant reasonably believed that he was acting in conformity with the General Statutes of North Carolina as they existed at the time the action was taken, and acted in good faith on the basis of this belief, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claim.

In a brief per curiam opinion (App. A1-A3), the court of appeals held that this charge "was adequate under the Supreme

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[2] The North Carolina Eugenics Act required that the person whose sterilization was sought be permitted to attend a hearing on the petition, and expressly recognized the right to representation by counsel at that hearing. (N.C.Gen.Stat. 35-45, App. A15-16.) The Board's practice was to hold such a hearing unless the person whose sterilization was sought had personally signed a "consent of patient" form. Respondents ordered petitioner's sterilization without her presence at a hearing and without her written waiver of her right to be heard.

[3] The statute required that sterilization petitions be submitted in writing and sworn to under oath. (N.C.Gen.Stat. § 35-43, App. A13-A14.) As the court of appeals found in its initial decision in this case (App. A4-A7), the summary of the petition prepared by the Board's executive secretary "set forth data not supported by other documents." (App. A7.)

Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982)." (App. A3.) During the pendency of a petition for rehearing, the court of appeals amended its opinion to add footnote 2, in which it reaffirmed its view that *Harlow* "did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial." (App. A3 n.2.) (emphasis in original)

REASONS FOR GRANTING THE WRIT

This case presents an important question about the qualified immunity defense available to state officials in actions brought under 42 U.S.C. § 1983. Certiorari should be granted to resolve the conflict between the circuits as to the relevance of subjective good faith in light of the Court's decision in *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982).

In *Harlow*, the Court appeared to limit the qualified immunity defense to "the objective reasonableness of an official's conduct," 457 U.S. at 818, i.e., whether the defendant's conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Id.

That respondents' conduct violated petitioner's "clearly established statutory or constitutional rights" is undisputed in this case.[4] What is at issue is whether respondents where

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[4] Petitioner's rights were "clearly established" as a matter of statutory and constitutional law.

The North Carolina Eugenics Act required that the Board provide notice and an opportunity to be heard to the person whose sterlization was sought. See note 2 *ante*. In addition, in 1968, North Carolina prohibited the voluntarily sterilization of a minor child without that child's written consent and approval by a juvenile court judge. N.C. Gen. Stat. 90-272. Moreover, the statute expressly mandated a thirty day "cooling off" period after judicial approval before a sterilization could be performed. N.C. Gen. Stat. 90-273.

In addition, as the Fourth Circuit held in *Cox* v. *Stanton*, 529 F.2d 47, 50 (4th Cir. 1975), petitioner's constitutional right to bear children had been established by the decision of this Court in *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942). That "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

(Footnote continued on following page)

entitled to a jury instruction that their subjective good faith would be a complete defense.[5]

In the view of the First Circuit, a jury instruction on subjective good faith is "superfluous" under *Harlow*. *Stathos* v. *Bowden*, 728 F.2d 15, 19 (1st Cir. 1984). The Fifth Circuit has endorsed this view, holding that once the court has determined that the law was "clearly established" at the time of the incident, "the only jury issue would be framed as the objective immunity standard of *Harlow* v. *Fitzgerald*." *Trejo* v. *Perez*, 693 F.2d 482, 488 (5th Cir. 1982). The same result was recently reached by the Seventh Circuit in *McKinley* v. *Trattles*, ____ F.2d ____ (7th Cir., No. 83-1345, April 23, 1984), where the court concluded that an official's "testimony that he believed, in good faith, that his conduct was authorized by the rules and regulations of the prison, is legally irrelevant to the immunity issue in this case." (slip op. 6.)

The view of the First, Fifth, and Seventh Circuits that subjective good faith is "superfluous" or "legally irrelevant" to the qualified immunity defense appears to be shared by the

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(Footnote continued from preceding page)

circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," had been "clearly established" in *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306, 314 (1950). Petitioner's constitutional entitlement as a minor child "to the procedural regularity and exercise of care implied in the phrase 'due process' " was "clearly established" by this Court in *In re Gault*, 387 U.S. 1, 27-28 (1967). Finally, the principle that "[n]otice to a person known to be an incompetent who is without the protection of a guardian does not measure up to [constitutional standards of procedural due process]" was "clearly established" by this Court in *Covey* v. *Town of Sumers*, 351 U.S. 141, 147 (1951).

[5] The "good faith" instruction given by the district court (App. A3 n.2) set out the "defense of good faith and probable cause . . . available to the [police] officers in the common-law action for false arrest and imprisonment." *Pierson* v. *Ray*, 386 U.S. 547, 557 (1967.)

Courts of Appeals for the Third, Sixth, Eighth, Ninth, Tenth, Eleventh, and District of Columbia Circuits.[6]

The Fourth Circuit, however, has adopted a conflicting view. In *McElveen* v. *County of Prince William,* 725 F.2d 954 (4th Cir. 1984), certiorari pending, No. 83-1723, the Fourth Circuit concluded that *Harlow* "did not hold that an *exclusively* objective standard was to be applied to claims that proceeded to trial." Id. at 958. (emphasis in original). This reasoning was applied and reaffirmed by the Fourth Circuit in this case (App. A3 n.2), where the court of appeals approved a jury instruction on subjective good faith. A similar conclusion was reached by a divided panel of the Second Circuit in *Anderson* v. *Coughlin,* 700 F.2d 37, 44 (2d Cir. 1982) ("in order to be immune from damage actions the executive official must have had a good faith belief that he was acting properly and there must have been reasonable grounds for that belief in light of all the circumstances as they reasonably appeared at the time").

This case provides an appropriate vehicle for resolving this conflict among the circuits. The evidence at trial left no question that respondents should have known that it was unlawful to order petitioner's sterilization without a hearing on the basis of a "consent" form signed by petitioner's father, who respondents knew was partially mentally disabled and who did not have legal custody of petitioner.[7] But for the "legally irrelevant" question of respondent's subjective good faith, *McKinley* v. *Trattles, supra,* slip op. 6, petitioner should be entitled to judgment against respondents as a matter of law.

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[6] *Czurlanis* v. *Albanese,* 721 F.2d 98, 108 n.8 (3d Cir. 1983); *Smith* v. *Heath,* 691 F.2d 220, 226 (6th Cir. 1982); *Miller* v. *Solem,* 728 F.2d 1020, 1024 (8th Cir. 1984); *Fujiwara* v. *Clark,* 703 F.2d 357, 359 n.3 (9th Cir. 1983); *Coleman* v. *Turpin,* 697 F.2d 1341, 1344 (10th Cir. 1982); *Barnett* v. *Housing Authority of City of Atlanta,* 707 F.2d 1571, 1581-83 (11th Cir. 1983); *McSurely* v. *McClellan,* 697 F.2d 309, 316 (D.C. Cir. 1982).

[7] Under North Carolina law in effect at that time, custody could only be given to the Director upon a judicial determination that the "child is in need of the care, protection, or discipline of the State." N.C. Gen. Stat. 110-29.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be granted.

May, 1984

KENNETH N. FLAXMAN
55 East Monroe Street
Suite 4005
Chicago, Illinois 60603
(312) 236-8558

Attorney for Petitioner

APPENDIX

In the
UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 83-1336

ELAINE RIDDICK,

Appellant,

v.

CLIFTON CRAIG, JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., individually and as members of the 1968 Eugenics Board of North Carolina; SUE CASEBOLT, individually and as Executive Secretary, 1968 Eugenics Board of North Carolina, JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., members of the Eugenics Commission of North Carolina.

Appellees,

and

DAVID WRIGHT, M.D.;
EUGENE A. HARGROVE, M.D.,

Defendants.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.
W. Earl Britt, *District Judge.* (C/A 74-2)

ARGUED: NOVEMBER 1, 1983—DECIDED: JANUARY 12, 1984

Before RUSSELL, HALL and MURNAGHAN, *Circuit Judges.*

AMENDED OPINION

PER CURIAM:

Elaine Riddick appeals from a judgment of the district court entered on a jury verdict in favor of defendants.

In 1974, Riddick filed suit under 42 U.S.C. § 1983 against various defendants, including Clifton Craig, Jacob Koomen, M.D., and R. L. Rollins, M.D., three members of the Eugenics Board of North Carolina, and Sue Casebolt, the Board's Executive Secretary. Riddick sought monetary damages, claiming that she had been wrongfully sterilized in 1968, in disregard of the standards of North Carolina's then existing eugenics statute, N.C. Gen. stat. §§ 35-36, et seq. (1966 Ed.).

The facts underlying this case are set out in a previous opinion of the court, *Doe v. Wright,* No. 81-1779 (4th Cir., April 26, 1982). In the earlier appeal, the district court's order, entering summary judgment in favor of Craig, Koomen, Rollins, and Casebolt, was reversed and the case was remanded for trial as to these four defendants.[1] At trial, the central issue was whether or not defendants were entitled to qualified or good faith immunity from liability for damages. After hearing testimony from plaintiff, all four defendants, and experts presented by both sides, the jury returned a verdict in favor of defendants and plaintiff appeals.

On appeal, Riddick contends that she is entitled to judgment against Craig, Koomen and Rollins as a matter of law because (1) the notice and hearing requirements of N.C. Gen. Stat. §§ 35-44 and 35-45 were not followed, (2) the consent of Riddick's father did not constitute a waiver of the notice and hearing requirements, and (3) the evidence was insufficient to establish that she was feebleminded or mentally retarded within the meaning of the eugenics statute. Riddick further contends that the trial court's jury instructions, including the

[1] That part of the district court's order granting summary judgment for two other defendants was affirmed. Doe v. Wright, No. 81-1779 (4th Cir., April 26, 1982).

charge on good faith immunity, were improper. Finally, Riddick submits that she was prejudiced by certain portions of defense counsel's argument.

Upon consideration of the record, the briefs, and oral argument, we find appellant's contentions to be without merit. Contrary to Riddick's assertions, the jury charge on good faith immunity was adequate under the Supreme Court's decision in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982),[2] and the jury instructions were otherwise proper. In addition, there is substantial evidence in the record to support the jury's verdict in favor of defendants. Finding no error in the proceedings below, we accordingly affirm the judgment of the district court.

Affirmed.

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[2] The jury instruction which Riddick challenges reads as follows:

> If the defendant reasonably believed that he was acting in conformity with the General Statutes of North Carolina as they existed at the time the action was taken, and acted in good faith on the basis of this belief, then his reasonable belief and good faith action would constitute a defense to the plaintiff's claim.

This instruction clearly required the jury to use an objective "reasonably prudent person" standard in evaluating defendant's actions taken in 1968 under then existing law.

Moreover, in this Court's recent decision in McElveen v. County of Prince William, No. 82-6679 (4th Cir. January 26, 1984), we found that a jury instruction, strikingly similar to the one in this case, was proper under *Harlow,* despite the fact that it contained both subjective and objective standards to measure good faith immunity. In *McElveen,* the jury was instructed that the State defendants would not be liable for damages for jail conditions found unconstitutional if the State defendants "believed in good faith that their actions were lawful, and that belief was a reasonable one for them to hold." Slip Opinion at 5. In *McElveen* we rejected the argument, which Riddick

In the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 81-1779

JANE DOE,

Appellant,

v.

DAVID WRIGHT, M.D., CLIFTON CRAIG, EUGENE A. HARGROVE, M.D., JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., individually and as members of the 1968 Eugenics Board of North Carolina; SUE CASEBOLT, individually and as Executive Secretary, 1968 Eugenics Board of North Carolina; JACOB KOOMEN, M.D., R. L. ROLLINS, M.D., members of the Eugenics Commission of North Carolina.

Appellees.

Appeal from the United States District Court for the Eastern District of North Carolina, at New Bern.
W. Earl Britt, *District Judge.*

ARGUED JANUARY 6, 1982—DECIDED APRIL 26, 1982

Before WINTER, *Chief Judge,* HAYNSWORTH, *Senior Circuit Judge,* and HALL, *Circuit Judge.*

PER CURIAM:

Following our decision in the related case of Cox v. Stanton, 529 F.2d 47 (4 Cir. 1975), the district court granted summary judgment for defendants on the ground that they were immune from liability for monetary damages. Plaintiff had sued under 42 U.S.C. § 1983 for damages for her involuntary sterilization under a North Carolina statute, now extensively revised.

We affirm in part and reverse in part.

I.

The defendants are those who, in 1968 when plaintiff was sterilized, were the members of the Eugenics Board of North Carolina which, pursuant to N.C. Gen. Stat. §§ 35-36 through 57 (1966 Ed.), directed plaintiff's sterilization; Dr. David Wright, who diagnosed plaintiff as "mentally retarded" for purposes of the sterilization petition; and Ms. Sue Casebolt, the Executive Secretary of the Eugenics Board. The summary judgment record establishes that while Dr. Wright examined plaintiff at the request of the County Social Services Departments and concluded that she was "mentally retarded," he made no recommendation that sterilization be performed, he did not perform the operation and he did not participate in the decision to authorize and direct that the operation be performed. We therefore conclude that the complaint alleges no cause of action against him and summary judgment in his favor was correctly entered.

The defendant, Eugene A. Hargrove, the North Carolina Commissioner of Mental Health, was a member of the Eugenics Board when plaintiff's sterilization was voted. The record shows, however, that on that date Hargrove was not present as the meeting of the Board and did not participate in the decision. Hargrove had delegated his power to a certain Dr. Weathers

who has not been joined as a defendant. The delegation was not unlawful and there is nothing to show that Hargrove was or could have been aware of any unconstitutional conduct on the part of Weathers. Thus we also conclude that summary judgment was properly entered for Hargrove.

With respect to the other members of the Eugenics Board, we are in agreement with the district court that in an appropriate case they may avail themselves of the defense of qualified immunity. *Cf.* O'Connor v. Donaldson, 422 U.S. 563 (1975). But it does not follow that this has been shown to be such a case. The defense of qualified immunity is not available to an official, otherwise entitled to invoke it, who "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff] . . . or if he took the action with the malicious intention to cause a deprivation of constitutional rights . . . " Wood v. Strickland, 420 U.S. 308, 322 (1975). Thus, one claiming immunity must first demonstrate that he was acting within the sphere of his official responsibility, or establish strict compliance with the statute under which he was purportedly acting. Then, the official must pass both an objective and a subjective test of the "good faith" of his actions. Downs v. Sawtalla, 574 F.2d 1, 11 (1 Cir. 1978). Finally, for summary judgment to be appropriate, compliance with the statute and good faith must be shown by the undisputed facts. *See* Fed. R. Civ. P. 56(c).

We do not think that the record establishes the lack of genuine factual dispute either as to whether defendants acted in accordance with the statute or whether they acted without legal malice. The papers before the Eugenics Board raise serious questions as to whether the sterilization was sought because, as N.C. Gen. Stat. § 35-46 requires, it was in the best interests of plaintiff or for the public good. Those papers assert that plaintiff's "chief problem is her home," and they suggest that sterilization may have been sought because plaintiff was poor and had become pregnant out of wedlock.

There is also considerable question as to whether the Board acted in conformity with other aspects of the law. Although plaintiff's father was mentally disabled and had not requested plaintiff's sterlization, the Board permitted him, apprently in contravention of N.C. Gen. Stat. § 35-45 to waive plaintiff's rights to notice, to appointment of a guardian, to representation by counsel, and to appeal the Board's determination.

Finally, it is not disputed that the Board's files were summarized by defendant Casebolt, who was Executive Secretary of the Board. The summary omitted a good deal of information contained in the files and set forth data not supported by other documents. The record leaves in doubt whether the members of the Board acted solely on the summary or on the entire file, and whether certain information found only in the summary had been obtained in accordance with the statute.

In short, the record leaves unresolved substantial questions as to whether the Board members acted in conformity with the statute so as to entitle them to interpose good faith immunity as a defense. In addition, the present record warrants an inference that the Board members, by failing to scrutinize plaintiff's file, acted with "callous disregard" of plaintiff's rights, or without subjective good faith. The precise role of Ms. Casebolt as an agent of the Board is not sufficiently clear on this record for us to determine if she is entitled to claim good faith immunity and if so entitled, whether the defense has been proved. Accordingly, summary judgment for the members of the Board (other than defendant Hargrove) and Ms. Casebolt must be reversed and the case remanded for further proceedings.

AFFIRMED IN PART,
REVERSED IN PART AND
REMANDED.

In the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 83-1336

ELAINE RIDDICK,

Appellant,

vs

CLIFTON CRAIG, *et al.*,

Appellees.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the East District of North Carolina, and was argued by counsel,

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said district court appealed from, in this cause, be, and the same is hereby, AFFIRMED.

Filed: January 12, 1984

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

In the
UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 83-1336

ELAINE RIDDICK,

Appellant,

versus

CLIFTON CRAIG, *et al,*

Appellees,

and

DAVID WRIGHT, M.D., *et al,*

Defendants.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Russell, Judge Hall, and Judge Murnaghan.

Filed: February 24, 1984

For the Court,

/s/ WILLIAM K. SLATE, II
CLERK

ARTICLE 7.

STERILIZATION OF PERSONS MENTALLY DEFECTIVE.

§ 35.36. State institutions anthorized to sterilize mental defectives.—The governing body or responsible head of any penal or charitable institution supported wholly or in part by the State of North Carolina or any subdivision thereof, is hereby authorized and directed to have the necessary operation for asexualization, or sterilization, performed upon any mentally diseased or feeble-minded inmate or patient thereof, as may be considered best in the interest of the mental, moral, or physical improvement of the patient or inmate, or for the public good: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall first be complied with.

§ 35.37. Operations on mental defectives not in institutions. —It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense to have one of the operations described in § 35.36, performed upon any mentally diseased or feeble-minded resident of the county, not an inmate of any public institution, upon the request and position of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person. Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with.

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the director of public welfare, or other similar official performing in whole or in part the functions of such director, or the next of kin

or legal guardian having custody or charge of the feeble-minded or mentally defective inmate, patient or noninstitutional individual.

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded or mentally diseased person who is on parole from a State institution, and, in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operaton is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the functions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor.

It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances;

(1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient, inmate, or noninstitutional individual, that he or she be operated upon.

(2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.

(3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.

(4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.

(5) In all cases as provided for in § 35-33.

§ 35-40. Eugenics Board created; membership, etc.—There is hereby created the Eugenics Board of North Carolina. All proceedings under this article shall be begun before the said Eugenics Board. This Board shall consist of five members and shall be composed of:

(1) The Commissioner of Public Welfare of North Carolina,

(2) The State Health Director,

(3) The chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina,

(4) The chief medical officer of the State Department of Mental Health,

(5) The Attorney General of the State of North Carolina.

Any one of those officials may for the purpose of a single hearing delegate his power to act as a member of said Board to an assistant: Provided, said delegation is made in writing to be included as a part of the permanent record said case. The said Board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time

to time select the member of the said Board designated above as the chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina.

§ 35-40.1. Eugenics Board authorized to accept gifts.—The Eugenics Board of North Carolina is hereby authorized and empowered to accept gifts from any source to be used by the Board for the furtherance of the purposes for which said Board was created.

§ 35-41. Quarterly meetings.—The Board of Eugenics shall meet at least quarterly in each year in Raleigh for the purpose of hearing all cases that may be brought before it and shall continue in session with appropriate adjournments until all current applications and other pending business have been disposed of. The members shall receive no additional compensation for their services.

§ 35-42. Secretary of Board and duties.—The Board shall appoint a secretary not a member of the Board who shall conduct the business of the Board between the times of the regular meetings. Such secretary shall receive all petitions, keep the records, call meetings, and in general act as the executive of said Board in such matters as may be delegated to him by said Board.

§ 35-43. Proceedings before Board.—Proceedings under this article shall be instituted by the petition of said petitioner to the Eugenics Board. Such petition shall be in writing, signed by the petitioner and duly verified by his affidavit to the best of his knowledge and belief. It shall set forth the facts of the case and the grounds of his opinion. The petition shall also contain a statement of the mental and physical status of the patient verified by the affidavit of at least one physician who has had actual knowledge of the case and who in the cases of inmates or patients of institutions described in § 35-36 may be a member of the medical staff of said institution. The Eugenics Board may require that the petitioner submit additional social and medical

history in regard to the inmate, patient or individual resident and his family. The prayer of said petition shall be that an order be entered by said Board authorizing the petitioner to perform, or to have performed by some competent physician or surgeon to be designated by him in the petition or by said Board in its order upon said inmate, patient or individual resident named in said petition in its discretion that the operation of sterilization or asexualization as specified in § 35-36 which shall be best suited to the interests of the said inmate or patient or to the public good.

§ 35-44. Copy of petition served on patient.—(a) A copy of said petition, duly certified by the secretary of the said Board to be correct, must be served upon the inmate, patient or individual resident, together with a notice in writing signed the secretary of the said Board designating the time and place not less than twenty days before the presentation of such petition to said Board when and where said Board will hear and pass and upon such petition. It shall be sufficient service if the copy of said petition and notice in writing be delivered to said inmate, patient or individual resident, and it shall not be necessary to read the above mentioned document to said patient, inmate or individual resident.

(b) A copy of said petition, duly certified to be correct, and the said notice must also be served upon the legal or natural guardian or next of kin of the inmate, patient or individual resident.

(c) If there is no next of kin, or if next of kin cannot after due and diligent search be found, or if there be no known legal or natural guardian of said inmate, patient or individual resident and the said inmate, patient or individual resident is of such mental condition as not to be competent reasonably to conduct his own affairs, then the said prosecutor shall petition the clerk of the superior court or the resident judge of the district or the judge presiding at a term of superior court of the county in which the inmate, patient or individual resident

resides, who shall appoint some suitable person to act as guardian ad litem of the said inmate, patient or individual resident during and for the purpose of proceeding under this article to defend the rights and interests of the said inmate, patient or individual resident. And such guardian ad litem shall be served likewise with a copy of the aforesaid petition and notice, and shall under all circumstances be given at least twenty days' notice of said hearing. Such guardian ad litem may be removed or discharged at any time by the said court or the judge thereof either in term or in vacation and a new guardian ad litem appointed and substituted in his place.

(d) If the said inmate, patient or individual resident be under twenty-one years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and notice and shall be entitled to at least twenty days' notice of the said hearing. Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the director of public welfare of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this article are compiled with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Board.

§ 35.45. Consideration of matter by Board.—The said Board at the time and place named in said notice, with such

reasonable continuances from time to time and from place to place as the said Board may determine, shall proceed to hear and consider the said petition and evidence offered in support of and against the same: Provided, that the said Board shall give opportunity to said inmate, patient or individual resident to attend the said hearings in person if desired by him or if requested by his guardian or next of kin, or the solicitor.

The said Board may receive and consider as evidence at the said hearings the commitment papers and other records of the said inmate or patient with or in any of the aforesaid institutions as certified by the superintendent or executive official, together with such other evidence as may be offered by any party to the proceedings.

Any member of the said Board shall have power for the purposes of this article to administer oaths to any witnesses at such hearing.

Depositions may be taken, as in other civil cases, by any party after due notice and read in evidence, if otherwise pertinent.

Any party to the said proceedings shall have the right to be represented by counsel at such hearings.

A stenographic transcript of the proceedings at such hearings duly certified by the petitioner and the inmate, patient or individual resident, or his guardian or next of kin, or the solicitor shall be made and preserved as part of the records of the case.

§ 35.46. Board may deny or approve petition.—The said Board may deny the prayer of the said petition or if, in the judgment of the Board, the case falls within the intent and meaning of one or more of the circumstances mentioned in § 35-39, and an operation of asexualization or sterilization seems to said Board to be for the best interest of the mental, moral or physical improvement of the said patient, inmate or

individual resident or for the public good, it shall be the duty of the Board to approve said recommendation in whole or in part or to make such order as under all the circumstances of the case may seem appropriate, within fifteen days after the conclusion of said hearings, and to send to the prosecutor a written order, signed by at least three members of the Board, directing him to proceed with the operation as provided in this article. Said order shall contain the name of the specific operation which is to be performed and the date when said operation is to be performed.

If the Board disapproves the petition, the case may not be brought up again except on the request of the inmate, patient, or individual resident, or his guardian, or one or more of his next of kin, husband, wife, father, mother, brother, or sister, until one year has elapsed.

Nothing in this article shall be construed to empower or authorize the Board to interfere in any manner with the right of the patient, inmate, or individual resident or his guardian or next of kin to select a competent physician of his own choice for consultation or operation at his own expense.

§ 35-47. Orders may be sent parties by registered mail; consenting to operation.—Any order granting the prayer of the petition, in whole or in part, may be delivered to the petitioner by registered mail, return receipt demanded, to all parties in the case, including the legal guardian, the solicitor and the next of kin of the inmate, patient, or individual resident. It shall be the duty of the said guardian, the solicitor and the next of kin to protect by such measures as may seem to them in their sole discretion sufficient and appropriate the rights and best interests of the said inmate, patient, or individual resident.

If the inmate, patient or individual resident, or the next of kin, legal guardian, solicitor of the county, and guardian appointed as herein provided, after the said hearing but not before, shall consent in writing to the operation as ordered by

the Board, such operation shall take place at such time as the said prosecutor petitioning shall designate.

§ 35.48. Right of appeal to superior court.—If it appears to the inmate, patient or individual resident, or to his or her representative, guardian, parent or next of kin, or to the solicitor, that the proceedings taken are not in accordance with the law, or that the reasons given for asexualization or sterilization are not adequate or well founded, or for any other reason the order is not legal, or is not legal as applied to this inmate, patient or individual resident, he or she may within fifteen days from the date of such order have an appeal of right to the superior court of the county in which said inmate or patient resided prior to admission to the institution, or the county in which the noninstitutional individual resides. This appeal may be taken by giving notice in writing to any member of the Board and to the other parties to the proceeding, including the doctor who is designated to perform the said operation. Upon the giving of this notice the petitioner within fifteen days thereafter shall cause a copy of the petition, notice, evidence and orders of the said Board certified by any member thereof to be sent to the clerk of the said court, who shall file the same and docket the appeal to be heard and determined by the said court as soon thereafter as may be practicable.

The presiding judge of said superior court may hear the appeal upon affidavit or oral evidence and in determining such an appeal may consider the record of the proceedings before the Eugenics Board, including the evidence therein appearing together with such other legal evidence as may be offered to the said judge by any party to the appeal. In hearing such an appeal the general public may be excluded and only such persons admitted thereto as have direct interest in the case.

Upon such appeal the said superior court may affirm, revise, or reverse the orders of the said Board appealed from and may enter such order as it deems just and right and which it shall certify to the said Board.

The pendency of such appeal shall automatically, and without more, stay proceedings under the order of the said Board until the appeal be completely determined. Should the decision of the superior court uphold the plaintiff's objection, such decision unless appealed from will annul the order of the Board to proceed with the operation, and the matter may not be brought up again until one year has elapsed except by the consent of the plaintiff or his next of kin, or his legal representatives. Should the court affirm the order of the Board, then, if no notice of appeal to the Supreme Court is filed within ten days after such decision, said Board's recommendation as affirmed shall be put into effect at a time fixed by the original prosecutor or his successor in office and the inmate, patient or individual shall be asexualized or sterilized as provided in this article.

In this appeal the person for whom an order of asexualization or sterilization has been issued shall be designated as the plaintiff, and the prosecutor presenting the original petition shall be designated as defendant.

§ 35-49. Appeal costs.—The cost of appeal, if any, to the superior or higher courts, shall be taxed as in civil cases. If the case is finally determined in favor of the plaintiff, the costs shall be paid by the county.

§ 35-50. Appeal to Supreme Court.—Any party to such appeal to the superior court may, within ten days after the date of the final order therein, apply for an appeal to the Supreme Court, which shall have jurisdiction to hear and determine the same upon the record of the proceedings in the superior court and to enter such order as it may find the superior court should have entered.

The pendency of an appeal in the Supreme Court shall operate as a stay of proceedings under any orders of the said Board and the superior court until the appeal be determined by the said Supreme Court.

§ 35-51. Civil or criminal liability of parties limited.—Neither the said petitioner nor any other person legally

participating in the execution of the provisions of this article shall be liable, either civilly or criminally, on account of such participation, except in case of negligence in the performance of said operation.

§ 35-52. Necessary medical treatment unaffected by article.—Nothing contained in this article shall be construed so as to prevent the medical or surgical treatment for sound therapeutic reasons of any person in this State, by a physician or surgeon licensed in this State, which treatment may incidentally involve the nullification or destruction of the reproductive functions.

§ 35-53. Permanent records of proceedings before Board.—Records in all cases arising under this article shall be filed permanently with the secretary of the said Eugenics Board. Such records shall not be open to the public inspection except for such purposes as the court may from time to time approve. (1933.)

§ 35-54. Construction of terms.—Where the inmates, patients, or noninstitutional individuals are referred to in this article as of the masculine or feminine gender, the same shall be construed to include the feminine or masculine gender as well. Wherever the term individual resident appears in this article, it shall be construed to mean noninstitutional individual.

§ 35-55. Discharge of patient from institution.—Before any inmate or patient designated in §§ 35-36 and 35-39, shall be released, paroled or discharged, it shall be the duty of the governing body or responsible head of any institution above mentioned to comply with the procedure set out in this article, whenever a written request for the asexualization or sterilization of said inmate or patient is filed with the governing body or responsible head of the institution in which such inmate or patient has been legally confined. This written request may be made by any public official or by the legal guardian or next of kin of any inmate or patient not later than thirty days prior to

the date of said parole or discharge. Upon the receipt of the signed approval of the Eugenics Board as described in this article, it shall be the duty of said governing board or responsible head to issue an order for the performance of the operation upon said inmate or patient, and the operation must be performed before the release, parole or discharge of any such inmate or patient.

§ 35-56. Existing rights of surgeons unaffected.—Nothing in Public Laws 1935, chapter 463 shall, in any way, interfere with any surgeon in the removal of diseased pathological tissue from any patient.

§ 35-57. Temporary admission to State hospitals for sterilization.—Any feeble-minded or mentally diseased person, for whom the Eugenics Board of North Carolina has authorized sterilization, may be admitted to the appropriate State hospital for the performance of such operation. The order of the Eugenics Board authorizing a surgeon on the regular or consulting staff of the hospital to perform the operation will be sufficient authority to the superintendent of such hospital to receive, restrain, and control the patient until such time as it is deemed wise to release such patient. All such admissions shall be at the discretion of the superintendent of the State hospital, and in making any agreement with any county or any State institution to perform such operations, the State hospital may collect a fee which shall not be greater than the cost of such operation and the cost of care and maintenance for the duration of the operation and the time required for the patient to recuperate.

The order of the Eugenics Board and the agreement of the superintendent of the State hospital to admit such patient shall be full and sufficient authority for the prosecutor or the sheriff of the county to deliver such patient to the proper State hospital.